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CMS Settlements May Let Hospitals Forgo Payments from MDs Involved in Stark Cases

Hospitals that struggle to recover money from physicians involved in Stark violations may get a break under the CMS self-referral disclosure protocol. As long as noncompliance is relatively minor (e.g., unsigned contracts), CMS may approve settlements that don't require physicians to return money that hospitals paid them for services under contracts that did not meet all Stark requirements, according to one attorney who has been in talks with CMS about six self-disclosures.

Why is this a relief for hospitals? The Stark regulation's "period of disallowance" prevents Medicare payments for services referred by physicians until they reimburse hospitals for any compensation they received under noncompliant contracts. "If the issue is settled through the CMS self-disclosure protocol, then the period of disallowance goes away," says Mishawaka, Ind., attorney Bob Wade, with Krieg Devault.

The period of disallowance has been a thorn in the side of hospitals. According to the Stark regulation, "no Medicare payment may be made for a designated health service that is furnished pursuant to a prohibited referral. The period during which referrals are prohibited is the period of disallowance…[which] begins at the time the financial relationship fails to satisfy the requirements of an applicable exception and ends no later than —

"(i) Where the noncompliance is unrelated to compensation, the date that the financial relationship satisfies all of the requirements of an applicable exception;

"(ii) Where the noncompliance is due to the payment of excess compensation, the date on which all excess compensation is returned by the party that received it to the party that paid it and the financial relationship satisfies all of the requirements of an applicable exception; or

"(iii) Where the noncompliance is due to the payment of compensation that is of an amount insufficient to satisfy the requirements of an applicable exception, the date on which all additional required compensation is paid by the party that owes it to the party to which it is owed and the financial relationship satisfies all of the requirements of an applicable exception."

Even when they fix Stark problems going forward, hospitals can't bill Medicare for physicians' services unless the physicians pay them back — "and most likely, the physicians will refuse to pay them back," Wade says. "They don't get Stark and I get why. They say, 'we rendered services and want payment.'" And they argue that the verbal arrangement is enforceable under state law.

Before the CMS self-referral disclosure protocol, which was mandated by the health reform law, hospitals had a big problem. Now, however, there may be a better way to neutralize the period of disallowance, Wade says. CMS officials have asked Wade whether doctors are repaying the money during the "look-back period"— the time when the contract was out of compliance— and if not, what his response has been. "We believe they were paid fair-market value for services rendered and this was an administrative error and therefore we are not seeking the return of fair-market value compensation paid," Wade responds. The jury is still out on whether this will fly, but Wade thinks there's a good chance CMS will accept settlements that don't include physician repayment for Stark violations caused by unsigned contracts, which he says make up the majority of disclosures to the CMS protocol. That probably won't be the case, however, for Stark violations stemming from above or below fair-market value compensation, Wade says.

Failing to Self-Report Is Risky

Wade is a believer in self-reporting, although he says clients ask him what would happen if they just try to lay low. "It's a risky proposition," he says, for two reasons:

(1) The Fraud Enforcement and Recovery Act and the health reform law together have made it more dangerous for hospitals to retain overpayments, because they may be sued for so-called reverse false claims; and

(2) Individuals who are a part of a hospital's decision to not report a known Stark or other Medicare violation could face personal liability under the relatively new co-conspirator amendment to the False Claims Act.

Meanwhile, the Department of Justice is heading down the path to physicians' offices with Stark on the brain. Although Stark imposes strict liability only on entities (e.g., hospitals) that furnish designated health services in violation of the law, physicians can be held liable under the False Claims Act or civil monetary penalty law if they cause claims to be presented in violation of Stark, says Macon, Ga., attorney Alan Rumph, of Smith Hawkins.

For example, after settling a Stark-based false claims case with Ohio Valley Health Education & Services Corporation, Ohio Valley Medical Center and East Ohio Regional Hospital for $3.8 million, the U.S. Attorney's Office for the District of West Virginia is turning to the physicians. "[The hospitals] were cooperative during the investigation and provided our agents with the information necessary to bring the first phase of the investigation to a conclusion. Phase Two of the case involves pursuing the physicians involved and requiring that they return the prohibited payments and pay the statutory penalties," U.S. Attorney William Ihlenfeld II said in a statement. His office did not respond to a request for more details on the case.

That's a surprise because, until recently, mainly hospitals, not physicians, were at risk under Stark, Rumph says. "Doctors now need to be particularly careful and they may have to look a gift horse in the mouth," he says. "They may need to independently assure themselves that what they are receiving in an arrangement is fair-market value for services they are providing. Just because a hospital is willing to pay it doesn't mean it's fair-market value. And the hospital isn't the only one facing potential liability."

In another case, *U.S. v. Campbell*, a federal judge in New Jersey appeared to conclude that a physician who had a part-time employment contract with a hospital system "caused" the hospital to submit false claims merely by knowing that the hospital would bill the government for services referred by the physician.

There's a difference in terms of intent, however. Hospitals just have to be noncompliant with the black-and-white letter of the Stark law to face enormous fines and penalties. To nail physicians for Stark violations, the government has to prove the intent standard of the False Claims Act or CMP law, which is reckless disregard or deliberate ignorance. For this reason, the court in Campbell denied the government's motion for summary judgment and held that Dr. Campbell's intent was a question for the jury to decide.

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